

GOVERNMENT LAW CENTER OF ALBANY LAW SCHOOL
GOVERNMENT LAW ONLINE

**PERSPECTIVES ON THE
CONSTITUTIONALITY OF VIDEO GAMING**

MAY 2003



80 New Scotland Avenue
Albany, NY 12208
www.als.edu

GOVERNMENT LAW ONLINE publications are available at www.governmentlaw.org

PERSPECTIVES ON THE CONSTITUTIONALITY OF VIDEO GAMING

KEVIN BEZIO '03

MAY 2003

These materials are copyright by Albany Law School (ALS) on behalf of its Government Law Center or ALS licensors and may not be reproduced in whole or in part in or on any media or used for any purpose without the express, prior written permission of Albany Law School or the licensor. Neither Albany Law School, the Government Law Center or any licensor is engaged in providing legal advice by making these materials available and the materials should, therefore, not be taken as providing legal advice.

All readers or users of these materials are further advised that the statutes, regulations and case law discussed or referred to in these materials are subject to and can change at any time and that these materials may not, in any event, be applicable to a specific situation under consideration. The information provided in these materials is for informational purposes only and is not intended to be, nor should it be considered to be, a substitute for legal advice rendered by a competent licensed attorney or other qualified professional. If you have any questions regarding the application of any information provided in these materials to a particular situation, you should consult a qualified attorney or seek advice from the government entity or agency responsible for administering the law applicable to the particular situation in question.

Perspectives on the Constitutionality of Video Lottery Gaming in New York State
By Kevin T. Bezio

Introduction

In the fall of 2001, New York lawmakers, backed by Governor George Pataki, authorized the largest expansion of gambling in New York since the advent of the State lottery in 1966.¹ A significant aspect of this legislative package was authorization for the enlargement of the State's lottery through the installation of video lottery terminals at various New York horse racing tracks.² Specifically, section 1617-a of the New York State Tax Law, which took effect October 29, 2001, states in pertinent part:

- a. The division of the lottery is hereby authorized to license, pursuant to rules and regulations to be promulgated by the division of the lottery, the operation of *video lottery gaming* at Aqueduct, Monticello, Yonkers, Finger Lakes, and Vernon Downs racetracks, or at any other racetrack licensed pursuant to article three of the racing, pari-mutuel wagering and breeding law that are located in a county or counties in which video lottery gaming has been authorized pursuant to local law, excluding the licensed racetrack commonly referred to in article three of the racing, pari-mutuel wagering and breeding law as the "New York state exposition" held in Onondaga county and the racetracks of the non-profit racing association known as Belmont Park racetrack and the Saratoga thoroughbred racetrack.³

The rationale underlying 1617-a's authorization of video lottery gaming was two-fold: the hope that placing these devices at racetracks would "provide a unique opportunity to generate

¹ *New York Expands Gaming: Pennsylvania Racing At Even Greater Risk*, PENN. HORSE RACING ASSOC. (Nov. 2001) at <http://www.pahorseracing.org/Newletters/nov2001.asp> (reporting that the measure is estimated to produce one billion dollars of tax revenue annually).

² See 2001 N.Y. Laws Ch. 383, Pt. C codified at N.Y. TAX LAW § 1617-a (McKinney 2003); *New York Expands Gaming: Pennsylvania Racing At Even Greater Risk*, PENN. HORSE RACING ASSOC. (Nov. 2001) at <http://www.pahorseracing.org/Newletters/nov2001.asp> (indicating that this expansion will "immediately allow up to 2,500 video lottery terminals (VLTs) at six race tracks and also make them available to another two race tracks with local approval"); Dennis Yusko, *Gaming at Race Tracks Closer to Reality*, TIMES UNION, May 18, 2002 available at <http://www.timesunion.com/AspStories/story.asp?storyID=49050>. This legislation also contained several other important aspects that have come under attack. This paper, however, only deals with issues surrounding the implementation of video lottery gaming.

³ N.Y. TAX LAW § 1617-a (McKinney 2003)(emphasis added).

significant revenue for school construction and . . . aid the ailing New York racing industry.”⁴ A lawsuit filed in New York State Supreme Court challenging this legislation’s constitutionality⁵ has brought to the fore Article 1, Section 9 of the New York State Constitution.⁶ More specifically, this suit calls into question the meaning of the provision “lotteries operated by the state” as contained in Article 1, Section 9.⁷ Because this clause has rarely been litigated, there is little case law on the topic. Thus, this paper examines the evolution of the lottery in New York State to demonstrate how video lottery gaming fits within the purview of New York’s constitutional scheme.

Historical Background

During New York’s colonial period, the use of lotteries was quite prevalent.⁸ Our colonial forefathers, however, drew a distinction between private and public lotteries.⁹ Private lotteries were strictly proscribed as public nuisances, while public lotteries were exploited as a means of raising money to fund various public works projects.¹⁰

⁴ Introducer’s Memorandum in Support, New York State Senate, Bill No. S5112 (April 18, 2001) (expounding further that “[t]he New York State horse racing industry has experienced a sharp decline in the past decade. The six harness tracks in this State have been the hardest hit of the pari-mutuel entities”).

⁵ See *Dalton v. Pataki, et al., and Park Place Entertainment*, Index No. 719-02 (Albany Co. Sup. Ct.).

⁶ Article 1, Section 9 of the New York State Constitution provides in relevant part:

except as hereinafter provided, no lottery or the sale of lottery tickets, pool-selling, bookmaking, or any other kind of gambling, except lotteries operated by the state and the sale of lottery tickets in connection therewith as may be authorized and prescribed by the legislature, the net proceeds of which shall be applied exclusively to or in aid or support of education in his state as the legislature may prescribe. . . .

N.Y. CONST. art. 1 § 9.

⁷ N.Y. CONST. art. 1 § 9.

⁸ See CHARLES Z. LINCOLN, *THE CONSTITUTIONAL HISTORY OF NEW YORK* 35 (1906) (listing a variety of projects funded through the introduction of a lottery); PETER J. GALIE, *ORDERED LIBERTY: A CONSTITUTIONAL HISTORY OF NEW YORK* 162 (1996); 84 Op. New York Att’y Gen. F-1 (noting that “lotteries have been a recurring method of raising public revenue”).

⁹ See LINCOLN, *supra* note 8, at 35 (1906) (highlighting the distinction early New York statesmen made between private and public lotteries); GALIE, *supra* note 8, at 162; 84 Op. New York Att’y Gen. F-1 (observing that important public projects “like the construction of the statehouse in Albany to accommodate the legislature” were financed from lottery proceeds).

¹⁰ See LINCOLN, *supra* note 8, at 35 (explaining that these public lotteries were authorized by various statutes beginning in 1746); GALIE, *supra* note 8, at 88; 84 Op. New York Att’y Gen. F-1. For example, a lottery was authorized to raise money to help dispel the costs of fortifying the City of New York, lottery revenues were used to

Subsequent to the adoption of New York’s first Constitution in 1777, the state legislature continued to allow the proliferation of public lotteries while seeking to repress private ones through the passage of a rigorous statutory scheme.¹¹ The state’s inconsistent position towards lotteries presupposed that it was immoral for individuals to raise money through the use of a lottery, but that it was permissible for the state or a municipality to do so.¹² This inherent contradiction resulted in public disrepute, which culminated in the Constitution of 1821’s prohibition of lotteries.¹³ This prohibition was maintained in the Constitution of 1846.¹⁴

Determined to examine gambling “in the light of ethics, morality, and propriety,”¹⁵ the delegates at the constitutional convention of 1894 implemented a universal ban on gambling.¹⁶ This however, was the pinnacle of anti-gaming sentiment in New York State.¹⁷ Since 1894, the comprehensive ban on gambling has been abated through various amendments to Article I, Section 9.¹⁸

fund “Kings College,” which is today Columbia University, and the City of Albany was empowered “to dispose of certain public lands by lottery to raise \$250,000 to discharge indebtedness incurred in the ‘erection of an academy, a Lancaster school, and in various other public improvements.” See LINCOLN, *supra* note 8, at 35-36 (1906).

¹¹ See LINCOLN, *supra* note 8 at 39 (explaining how “[p]rivate lotteries were deemed prejudicial to the morals of the community).

¹² *Id.*

¹³ See *id.* (noting that “[t]he contradiction was especially emphasized by the act of 1820, which authorized the city of Albany to dispose of land by lottery to raise money to pay a debt, which, according to the preamble, the city could not conveniently pay without disposing of its vacant lands . . .”); 84 Op. New York Att’y Gen. F-1 (expounding that “corruption, scandal and the inherent contradiction between the condemnation of private lotteries and the proliferation of public ones brought the practice into disfavor . . .”).

¹⁴ See GALIE, *supra* note 8, at 162.

¹⁵ *Id.* (quoting Edward Lauterbach).

¹⁶ *Id.* (highlighting that “[t]he anti-gambling amendment was consistent with the convention’s overall goal of eliminating corruption and immorality in public life” and, therefore, “passed overwhelmingly by a vote of 109 to 4”).

¹⁷ See *id.*

¹⁸ See *id.*; 84 Op. New York Att’y Gen. F-1; 81 Op. New York Att’y Gen. 68, 1981 WL 145788. Specifically, the text was amended in 1939 to allow betting on horse races; a 1957 amendment allowed religious, charitable and certain non-profit groups to conduct bingo or lotto; in 1966 a state-run lottery was sanctioned; and in 1975 the “bingo” exception was expanded to allow non-profit groups to run other games of chance. *Id.*

1966 Amendment

In 1966, the State Constitution was amended to authorize “lotteries operated by the state.”¹⁹ The net proceeds from these lotteries were to “be applied exclusively to or in aid or support of education in this state as the legislature may prescribe.”²⁰ It is important to note that in New York, constitutional amendments must pass two legislative sessions before they are submitted to the people for a vote.²¹ The 1966 lottery amendment was therefore debated and passed by the legislature in 1965, and again in 1966, before being ratified by the people in November of 1966.²² Thus, in order to determine what was envisioned by the phrase “lotteries operated by the state,”²³ one must, look to the debates surrounding this amendment.²⁴ Because the State Assembly did not keep records of debates at that time, the only transcripts available are those of the State Senate.²⁵

The Senate debates of 1965 and 1966 focused on how the proposed lottery would operate.²⁶ The amendment’s sponsors envisioned a lottery that would closely parallel the New Hampshire lottery, which was based on the results of certain horse races.²⁷ For example, the 1965 debate began with one of the proposals sponsors, Senator Mangano, stating “that the

¹⁹ N.Y. CONST. art. I, § 9. Specifically, the amendment provided for “lotteries operated by the state and the sale of lottery tickets in connection therewith as may be authorized by the legislature, the net proceeds of which shall be applied exclusively to or in aid or support of education in this state as the legislature may prescribe.” N.Y. CONST. art. I, § 9.

²⁰ N.Y. CONST. art. I, § 9.

²¹ N.Y. CONST. art. 19, § 1; see Bennett Liebman, *Legislative Intent and New York’s 1966 Lottery Amendment*, available at <http://www.als.edu/glc/wagering/legislature%20intent%20and%20NewYork’s%201966%20Lottery%20Amendment.doc>.

²² See Liebman, *supra* note 21.

²³ N.Y. CONST. art. I, § 9.

²⁴ See *id.* (discussing the Senate debates that took place prior to the passage of the 1966 amendment).

²⁵ See *id.*

²⁶ See *id.* (explaining that for most of the sponsors of the answer to this question was simple).

²⁷ See Liebman, *supra* note 21. Further, it is important to note, that the New Hampshire lottery was the first modern lottery in the United States and was based on the Irish Sweepstakes. *Id.* Started in 1930, the Irish Sweepstakes was a government plan to raise funds for the construction of hospitals in Ireland. See Pat Friend, *What Ever Happened to the Irish Sweepstakes*, at <http://www.allaboutirish.com/library/bits/sweepstakes.htm> (last visited April 23, 2003). Held four times a year, the Irish Sweepstakes was “based on the results of four well-known horse races.” *Id.*

amendment was based on a lottery of four or five races a year.”²⁸ Senator Speno, asserted that four or five races would not be adequate, and added that there perhaps could “be as many as ten races per year.”²⁹ Finally, Senator Brownstein, another of the sponsors was the most explicit when he declared “[w]hat we are talking about here is a state-operated game of chance which is dependent upon designated races.”³⁰

The 1966 debates simply mirrored those of 1965.³¹ The sponsors still believed that the lottery would be closely linked to the results of specific horse races. Their notion of a sweepstakes was furthered by the fact that in 1965, Congress passed a statute exempting State lotteries, based on the results of horse races, from a 10% federal excise tax on wagering.³²

Opponents to the amendment, in addition to making the typical moral arguments,³³ questioned the ambiguous language of the proposal.³⁴ For example, Senator Laverne observed, “[a] lot of us are not sure what we are talking about when we say lottery.”³⁵ Further, Senator Brydges, the Senate majority leader at the time, complained somewhat prophetically, “that there was nothing limiting the number of lotteries and nothing limiting the lottery to sweepstakes races.”³⁶

²⁸ See Liebman, *supra* note 21 (citing Debate on S.289, June 14, 1965, Senate Transcript at 4763).

²⁹ See *id.* (citing Debate on S.289, June 14, 1965, Senate Transcript at 4788). Yet another sponsor, Senator Mackell postulated that the lottery could be based “on not four, but maybe six or eight, the best, the biggest races throughout the country.” *Id.* (citing Debate on S.289, June 14, 1965, Senate Transcripts at 4793).

³⁰ See *id.* (citing Debate on S.289, June 14, 1965, Senate Transcript at 4807).

³¹ See Liebman, *supra* note 19 (stressing that “[t]he sponsors again believed that they were tying the lottery to the results of certain horse races).

³² See *id.*; Steve Cady, *Form of Lottery Remains to be Settled, But Sweepstakes System Based on Horse Races is Expected*, N.Y. TIMES, November 10, 1966 at 35. For example, after the lottery amendment had been ratified by the people Senator Brownstein commented that “the lottery, of necessity, had to be based on pari-mutuel races in order to avoid a federal tax on gambling.” Liebman, *supra* note 21; Steve Cady, *Form of Lottery Remains to be Settled, But Sweepstakes System Based on Horse Races is Expected*, N.Y. TIMES, November 10, 1966 at 35.

³³ See Liebman, *supra* note 21. Specifically, “[o]pponents complained about the morality of the government garnering money from gambling, the issue of the earmarking of the lottery revenue for education, and the regressive nature of the lotteries.” *Id.*

³⁴ See Liebman, *supra* note 21.

³⁵ See *id.* (citing S.897, February 7, 1966, Senate Transcripts).

³⁶ See *id.*

Put simply, although the language of the amendment is ambivalent, it is clear that the supporters of the amendment imagined a lottery based on the results of certain horse races, which “would not be a daily occurrence.”³⁷ Since, the current lottery bears no resemblance to a sweepstakes on selected horse races, this legislative history is not determinative of the issue and one must therefore turn to the scant case law in an attempt to extract a definition of the term “lottery.”³⁸

Advisory Opinions of the New York State Attorney General

In the early 1980s, the New York State Attorney General furnished a pair of formal opinions scrutinizing the constitutionality of various games proposed by the New York State Division of the Lottery.³⁹ Undertaking a similar mode of analysis in each case, the Attorney General in these opinions, interpreted the lottery exception very narrowly explaining that the provision “cannot be read as a blanket authorization to offer all sorts of games of chance to the public without doing violence to the constitutional scheme and without so expanding the limited authorization as to swallow the basic constitutional prohibition.”⁴⁰ Thus, relying heavily on a narrow interpretation of the definition of the term “lottery” as set forth in section 225.00(10) of the Penal Law⁴¹ the Attorney General surmised that it was absolutely clear that “the state lottery

³⁷ See *id.* (emphasizing that “even the opponents did not seem to envision that the lottery would expand to more than a weekly operation”).

³⁸ See *infra* notes 39-45, 51-56 and accompanying text.

³⁹ See 81 Op. New York Att’y Gen. 68, 1981 WL 145788 (opining that the “proposed computer games are not lotteries within the constitutional and statutory definitions and would constitute illegal gambling activity”); 84 Op. New York Att’y Gen. F1 (concluding that the “Constitution both through its specific bans on bookmaking and pool-selling and through its general ban on all forms of gambling not expressly authorized, forbids the kinds of gambling involved in the proposed sports betting game”).

⁴⁰ See 81 Op. New York Att’y Gen. 68, 1981 WL 145788 at *5.

⁴¹ N.Y. PENAL LAW § 225.00(10) (McKinney 2003). Section 225.00(10) provides in pertinent part:

“Lottery” means an unlawful gambling scheme in which (a) the players pay or agree to pay something of value for chances, represented and differentiated by numbers or by combinations of numbers or by some other media, one or more of which chances are to be designated the winning ones; and (b) the winning chances are to be determined by a drawing or by some other method based upon the element of chance; and (c) the holders of the winning chances are to receive something of value.

has invariably been seen and run as a game based on the sale of a ticket on which there would be a number, which number would through the happening of some state-controlled random event, usually a drawing, be designated a winner.”⁴² Further, the Attorney General, relying on the standard dictionary definition of the term “chance” concluded “in New York, a lottery requires a lot.”⁴³

Based on the Attorney General’s narrow construction of the lottery exception, it is tough to imagine any mechanical gaming device that could withstand constitutional muster.⁴⁴ Looking at these opinions retrospectively, however, it appears that they may have been driven more by policy than strict legal analysis. Put frankly, they were the product of the political climate of the times as they sought to limit the extent of the State’s involvement in what was seen by many as a vice. Secondly, when these opinions were handed down, the lottery merely consisted of a basic numbers game and the primary stages of an instant lottery.⁴⁵ Accordingly, these opinions, like the Senate debates regarding the 1966 amendment, are somewhat antiquated, and are therefore not instrumental in the resolution of the current debate over the constitutionality of video lottery gaming.

The Lottery Revolution

Commencing in the late 1980s and continuing throughout the 1990s the New York lottery underwent a massive transformation. With the advent of the instant game, there was a conceptual shift fueled by the public’s insatiable appetite for better and more entertaining

N.Y. PENAL LAW § 225.00(10) (McKinney 2003).

⁴² 84 Op. New York Att’y Gen. F1.

⁴³ *Id.*

⁴⁴ See *An Introduction to VLTs*, at <http://www2.als.edu/glc/wagering/vlt.html> (April 9, 2002).

⁴⁵ See 81Op. New York Att’y Gen. 68, 1981 WL 145788 at *4 (noting “that the details of the New York lottery have changed several times”).

games.⁴⁶ Thus, New York was forced to make a decision: provide games sought by the market or lose a vital stream of revenue.⁴⁷

New York is an excellent illustration of how market forces have transfigured state lotteries. For example, New York currently offers seven (7) different "Draw Games" with varying payouts and drawings ranging in frequency from twice a week to every four minutes.⁴⁸ Further, New York avails players a choice of among forty-seven (47) different "Instant Games" varying in price from one (1) to (5) dollars.⁴⁹ These innovations have been remarkably successful. For the fiscal year 2002, lottery sales in New York exceeded 4.75 billion generating approximately 1.58 billion in revenue to support education across the state.⁵⁰

Trump v. Perlee

The sole case addressing the proper scope of the state lottery is Trump v. Perlee,⁵¹ a fourteen-line opinion handed down by the First Department in 1996.⁵² In 1995, Donald Trump made a motion in New York State Supreme Court, New York County, seeking a preliminary injunction enjoining the respondents from operating the game known as "Quick Draw."⁵³ The Supreme Court Judge denied the motion and found that Trump was not "entitled to a preliminary injunction as he failed to demonstrate a likelihood of success on the merits."⁵⁴ On appeal, the First Department affirmed observing that "[t]he statute and regulations creating the lottery game

⁴⁶ Patricia McQueen, Lecture to the Albany Law School Current Legal Issues in Government Class (April 21, 2003)(commenting that "the public loves lotteries").

⁴⁷ *Id.*

⁴⁸ See New York State Division of the Lottery Home Page at http://www.nylottery.org/ny/nyStore/cgi-bin/ProdSubEV_Cat_300_NavRoot_300.htm (last visited April 21, 2003).

⁴⁹ See New York State Division of the Lottery Home Page at http://www.nylottery.org/ny/nyStore/cgi-bin/ProdSubEV_Cat_300_NavRoot_301.htm (last visited April 21, 2003).

⁵⁰ See Margaret R. DeFrancisco, *Director's Message*, at http://www.nylottery.org/ny/nyStore/cgi-bin?ProdSubEV_Cat_333652_NavRoot_305.htm (last visited April 21, 2003); Patricia McQueen, *Answering the Demands: U.S. Lotteries in 2002 Continue to provide Much-Needed Revenue to Governments*, INTERNATIONAL GAMING & WAGERING BUSINESS 21-25 (Mar. 2003).

⁵¹ 228 A.D.2d 367 (1st Dep't 1996).

⁵² The proper name of the Court is the New York State Supreme Court Appellate Division, First Department.

⁵³ *Id.*

are presumed constitutional which presumption was not rebutted by petitioner beyond a reasonable doubt.”⁵⁵ Further, citing section 225.00(10) of the Penal Law, the court found that “Quick Draw contains all the essential features of a lottery, since a player tenders money for numerical selection, the winning numbers are randomly drawn, and the player receives a prize if the numbers match.”⁵⁶ Thus, because the court in Trump provided a much more progressive interpretation of the lottery exception contained in Article 1, Section 9, finding that “Quick Draw” is within the purview of that provision, the door remains open for other innovations such as a video lottery.

Video Lottery Terminals

Despite authorizing the “operation of video lottery gaming” subject to the rules promulgated by the Division of the Lottery, section 1617-a is silent with regard to the meaning and scope of the term “video lottery gaming.”⁵⁷ Because video lottery terminals can take many forms and be programmed to offer a variety of games,⁵⁸ the lack of a statutory definition has caused a great deal of concern. Opponents of this provision claim that these devices are merely “slot machines,” which are outlawed in New York.⁵⁹ This concern however, appears to be misplaced as New York, unlike the five states that presently offer video lotteries,⁶⁰ has taken a unique approach by mandating the implementation of a true video lottery.⁶¹ Besides supplying a centralized payout, New York’s video lottery will display many of the same characteristics as an

⁵⁴ *Id.*

⁵⁵ *Id.* at 368.

⁵⁶ *Id.*

⁵⁷ N.Y. TAX LAW § 1617-a (McKinney 2003).

⁵⁸ See generally Patricia A. McQueen, *All Systems Go: New Technologies Are Changing the Way Lotteries Run and Manage Their VLT Systems*, INTERNATIONAL GAMING & WAGERING BUSINESS 21 (March 2003).

⁵⁹ *Dalton v. Pataki, et al., and Park Place Entertainment*, Index No. 719-02 (Albany Co. Sup. Ct.); N.Y. PENAL LAW § 225.00(8) (McKinney 2003).

⁶⁰ The five states that currently offer a video lottery are: Delaware, Oregon, Rhode Island, South Dakota, and West Virginia. See McQueen, *supra* note 50, at 21.

⁶¹ Patricia McQueen, Lecture to the Albany Law School Current Legal Issues in Government Class (April 21, 2003).

instant game. Basically, these devices will provide the player the video equivalent of the scratch off tickets that are presently the staple of New York's lottery scheme.

Conclusion

Throughout a significant part of New York's history, a public lottery has been utilized to provide essential revenues to various governmental entities. The scope and legal status of the lottery has been nebulous, fluctuating with the mores of society. Although the framers were aware of this influx, in the 1966 amendment they used general language, simply authorizing "lotteries operated by the state."⁶² Following the amendment, the lottery quickly expanded beyond the parameters of the amendment's original intent. Then with the introduction and enormous popularity of scratch off tickets, the lottery underwent a complete transformation, fueled by the public's desire for games that provide greater levels of entertainment. This expansion occurred largely unchallenged, establishing the lottery as an accepted form of entertainment resulting in more progressive interpretations of the lottery exception contained in Article I, Section 9.

Accordingly, based on 1) current liberal interpretations of Article I, Section 9's broad lottery exception, 2) the fact that New York's video lottery will display the same characteristics as the currently accepted and tremendously popular instant games, and 3) the market's demand for a new generation of lottery games, video lottery gaming falls within the purview of New York's historical and constitutional scheme.

⁶² N.Y. CONST. art. 1 § 9.

